

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## Advice Memorandum

DATE: October 14, 2003

TO : Alan B. Reichard, Regional Director  
Region 32

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: PC Doctor, Inc.  
Case 32-CA-20466-1

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The Region submitted this Section 8(a)(1) case for advice on whether the Employer's motion to limit allegedly improper communications in a state court overtime lawsuit filed by employees was unlawfully preempted or baseless and retaliatory under the principles set forth in BE & K Constr. Co. v. NLRB.<sup>1</sup>

We conclude that the Employer did not violate the Act as alleged. Initially, the Employer's motion is not preempted by the Act. Moreover, the Employer's motion was not baseless or retaliatory and, therefore, was not unlawful under BE & K.

### FACTS

PC Doctor, Inc. ("the Employer") develops and distributes computer diagnostic software. It has offices in Davis and Emeryville, California. It employs about 36 employees, who do not belong to a union.

In May 2000, Scott Banks, the facilities manager/human resources assistant at the Emeryville office, and several of his coworkers began complaining among themselves that they were low-paid, salaried employees without managerial authority and treated by the Employer as exempt from California's overtime pay requirements. In October 2001, Banks filed an individual claim for unpaid overtime with California's Division of Labor Standards Enforcement (DLSE). He also distributed claim forms to coworkers and contacted them by e-mail to advise them of their rights. By December 2001, about 15 other employees also had filed overtime claims with the DLSE against the Employer.

In early February 2002, Banks sent an e-mail message to the Employer's owners, asserting that they had not been

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<sup>1</sup> 536 U.S. 516 (2002).

responsive to employee concerns about overtime pay and that he and his coworkers were considering initiating a class action lawsuit for overtime pay. When the owners did not respond to the message, Banks and other employees contacted attorney Mark Thierman for legal advice.

On February 22, 2002, the Employer terminated Banks for lack of productivity and for sending inappropriate e-mail messages from his work computer to the home computer of one of the Employer's owners. Banks did not file an unfair labor practice charge over his termination. Subsequently, he volunteered his services to Thierman's law firm to assist with the overtime litigation.

On April 15, 2002, attorney Thierman filed a lawsuit against the Employer in Alameda County Superior Court on behalf of three employee plaintiffs and similarly situated present and former employees for unpaid overtime compensation. To achieve class action status, the court required the plaintiffs to submit declarations from employees describing their job duties and the circumstances under which they worked overtime.

In January 2003,<sup>2</sup> attorney Thierman's law firm formally hired Banks as a legal assistant. His duties included soliciting employee declarations to support the overtime suit and keeping employees apprised of the status of the case. Banks remained in contact with the Employer's current employees by sending e-mail messages from his home computer to their home computers. He also left short voice-mail messages on a few of the employees' work phones. At the time Banks made these contacts, the state court had yet to certify the class.

On February 18 and 19, Banks sent group e-mail messages concerning the pending lawsuit to current employees from his home computer to their home computers. On March 12, he sent a third group e-mail message to current employees regarding how to handle individual settlement offers from the Employer. None of these messages disclosed that Banks worked for Thierman's law firm.

On March 20, the Employer filed a Motion to Limit Plaintiffs' Improper Communications with Putative Class Members and a supporting memorandum with the state court. The basis for the motion, as set forth in the Employer's court papers, were the three group e-mail messages that

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<sup>2</sup> All dates after this point are in 2003.

Banks sent in February and March.<sup>3</sup> The Employer asserted that those messages contained "false, misleading, and confusing information, which undermines the class action process and [the Employer's] efforts to resolve its employees' claims informally." The motion sought, among other things, to prohibit,

Plaintiffs, their Counsel, and agents of Plaintiffs or their counsel from sending any communications to any unrepresented putative class member that (a) are false, misleading or deceptive; (b) seek to drum up participation in the class action or discourage individuals from seeking individual settlement of claims; (c) could lead to confusion or interfere with these proceedings; (d) set arbitrary deadlines for action; or (e) provide legal advice.

On the same day, the state court set the Employer's motion for hearing on March 27. It also granted a temporary order prohibiting either party from communicating with putative class members about matters related to the overtime suit until the March 27 hearing on the motion.

On April 4, the state court issued its order. The court held that all three group e-mail messages were inherently misleading because they failed to disclose that Banks worked for the plaintiffs' attorney. The court found that the February 18 message was coercive because it suggested putative class members would not be included in a negotiated pre-certification settlement unless they provided declarations about their job descriptions to plaintiffs' attorney. The court also found that the February 18 and March 12 messages impermissibly promised results by stating that putative class members were entitled to overtime and by encouraging the rejection of individual settlement offers because employees could receive more under a class settlement. Finally, the court found that the March 12 message was legally incorrect because it implied that the court would be more willing to find that an employee is entitled to overtime if that employee submitted a declaration and because it informed putative class members that they could create an attorney-client relationship with the plaintiffs' attorney merely by telling the Employer such a relationship existed.

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<sup>3</sup> The Employer also asserted that the three group e-mail messages appeared to be part of a larger pattern of improper communications with putative class members, but did not specify any other examples.

Based on these conclusions, the state court granted in part and denied in part the Employer's motion.<sup>4</sup> The court imposed its order on counsel for both parties, including their agents and staffs. The court prohibited counsel from communicating with putative class members about the likelihood of prevailing on the merits. It also prohibited counsel from sending mass communications, such as form e-mail messages, to putative class members without prior notice to the court and opposing counsel. The court stated that its approval was needed for communications regarding settlement.

At the same time, the court stated that certain communications were permissible without court approval. The court permitted counsel to communicate with individual putative class members to investigate the facts of the case, to solicit witness declarations, and to ask them to request copies of their payroll records from the Employer and provide them to counsel. Specifically as to plaintiffs' counsel, the court stated that he was permitted to inform putative class members about the nature of the litigation and the possibility that a larger award might be obtained through a class action suit than in settlement.

On May 1, the court denied the plaintiffs' motion for class status certification. The court concluded that the plaintiffs had failed to establish that common issues of fact and law exist within the proposed class. Attorney Thierman intends to continue pursuing the overtime suit and to appeal the court's denial of class status.

#### **ACTION**

We conclude that the Region should dismiss this charge, absent withdrawal. The Employer's motion is not unlawful as preempted because the conduct the motion sought to limit was not "actually" protected and the Employer did not engage in any other conduct subject to an administrative complaint alleging such conduct to be protected. Moreover, the Employer's motion is not unlawful under BE & K Constr. Co. because it is neither baseless nor retaliatory.

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<sup>4</sup> Plaintiffs' attorney Thierman did not appeal the court's order and both parties are abiding by it.

I. THE EMPLOYER'S MOTION IS NOT UNLAWFUL UNDER A PREEMPTION THEORY OF VIOLATION.

The Board is not precluded from enjoining lawsuits that either are "beyond the jurisdiction of the state courts because of federal-law preemption, or . . . [have] an objective that is illegal under federal law."<sup>5</sup> The preemption principles set forth in either Brown<sup>6</sup> or Garmon<sup>7</sup> are used to determine if a lawsuit is preempted. If the suit is found to be preempted under one of those sets of principles, "it violates Section 8(a)(1) if it tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights."<sup>8</sup> Because we conclude that the Employer's motion was not preempted under Brown or Garmon, the Employer did not violate Section 8(a)(1) on preemption grounds.

A. The Employer's Motion Is Not Preempted Under Brown.

In Brown v. Hotel Employees,<sup>9</sup> the Court held that if conduct is "actually" protected by Section 7 of the Act, rather than merely "arguably" protected, state law that purports to regulate it is preempted not as a matter of the primary jurisdiction of the Board but as a matter of substantive right. The Board has found lawsuits that clearly encompassed conduct "actually" protected by the Act to be unlawful because they were preempted.<sup>10</sup>

The preemption principles established in Brown do not apply in this case because it is not clear that the Employer's state court motion sought to interfere with

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<sup>5</sup> Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 737 n.5 (1983).

<sup>6</sup> Brown v. Hotel & Restaurant Employees Local 54, 468 U.S. 491 (1984).

<sup>7</sup> San Diego Building Trades v. Garmon, 359 U.S. 236 (1959).

<sup>8</sup> Webco Industries, Inc., 337 NLRB No. 48, slip op. at 3 (2001) (citations omitted).

<sup>9</sup> 468 U.S. at 502-503.

<sup>10</sup> See, e.g., Federal Security, Inc., 336 NLRB 703, 703 n.3 (2001) (citing Manno Electric, Inc., 321 NLRB 278, 298 (1996), enfd. per curiam mem. 127 F.3d 34 (5th Cir. 1997)). See also Associated Builders & Contractors, Inc., 331 NLRB 132, 132 n.1 (2000).

"actually" protected activity. Construing its over-arching concerns, the motion sought to limit "false, misleading, and confusing" communications from the plaintiff-employees to putative class members (i.e., other current employees). Thus, although employee discussions about a suit dealing with overtime compensation are generally protected by the Act,<sup>11</sup> those discussions would lose protected status if they contain maliciously false statements.<sup>12</sup> Because there is a potential that the plaintiffs' communications would not be protected by the Act, there is no "actual" conflict between the terms of the Employer's state court motion and the plaintiff-employees' federal labor law rights.

B. The Employer's Motion Is Not Preempted Under Garmon.

In San Diego Building Trades Council v. Garmon,<sup>13</sup> the Supreme Court held that "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 . . . or [prohibited] under § 8," or even "arguably subject" to those sections, the state and federal courts are ousted of jurisdiction. In those circumstances, the courts "must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."<sup>14</sup>

Subsequently, in Sears, Roebuck & Co. v. Carpenters,<sup>15</sup> the Court defined when a state is not preempted from regulating conduct "arguably" protected by Section 7. The Court stated that a state is free to regulate "arguably" protected conduct "when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so."<sup>16</sup> Nevertheless, state regulation may be inappropriate

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<sup>11</sup> See, e.g., Salt River Valley Users' Assn. v. NLRB, 206 F.2d 325, 328 (9th Cir. 1953), enfg. in relevant part 99 NLRB 849, 853-854 (1952).

<sup>12</sup> See generally Bituma Corp., 314 NLRB 36, 44 & n.35 (1994) (noting that "deliberately and maliciously false" statements are not protected by Section 7).

<sup>13</sup> 359 U.S. at 244-245.

<sup>14</sup> Id. at 245.

<sup>15</sup> 436 U.S. 180 (1978).

<sup>16</sup> Id. at 202-203.

if the exercise of state jurisdiction would "create a significant risk of misinterpretation of federal law and the consequent prohibition of protected conduct."<sup>17</sup>

In Loehmann's Plaza,<sup>18</sup> the Board explained when state regulation of arguably protected conduct is preempted. In that case, the employer first directed union picketers to relocate off of its property. The employer then filed a state court civil trespass suit for injunctive relief.<sup>19</sup> The Board initially concluded that the employer had violated 8(a)(1) by directing the picketers to move.<sup>20</sup> The Board then held that when the conduct a state is attempting to regulate merely constitutes "arguably" protected activity, preemption occurs only upon Board involvement in the matter.<sup>21</sup> Board involvement occurs when the General Counsel issues a complaint regarding the same activity that is the subject of the state court lawsuit.<sup>22</sup> At that point, the pending lawsuit is preempted and the plaintiff must seek a stay of that lawsuit within seven days of the issuance of the complaint pending Board disposition of the ULP complaint.<sup>23</sup> Because the employer failed to take this action after the General Counsel had issued complaint over the employer's pre-lawsuit conduct, the employer's state court lawsuit was preempted.<sup>24</sup>

In the current case, we will assume that the Employer's state court motion seeks to interfere with arguably protected activity. Nevertheless, we conclude the motion is not preempted under Garmon because, in light of the principles set forth in Sears and Loehmann's Plaza, the Board is not otherwise involved in this case. Here, the Employer merely filed a motion in the state court suit. The Employer here is not alleged to have committed any other

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<sup>17</sup> Id. at 203.

<sup>18</sup> 305 NLRB 663, 669-670 (1991), supplemented by 316 NLRB 109 (1995), review denied sub nom. United Food & Commercial Workers Local 880, 74 F.3d 292 (D.C. Cir. 1996).

<sup>19</sup> Id., 305 NLRB at 664.

<sup>20</sup> Id. at 668.

<sup>21</sup> Id. at 669-670.

<sup>22</sup> Id. at 670.

<sup>23</sup> Id. at 671.

<sup>24</sup> Id. at 672.

violation besides filing the motion that could form the basis of a charge that would permit the General Counsel to find arguable merit and issue complaint, all of which is necessary to find Garmon preemption. Absent such Board involvement, the Employer's lawsuit is not preempted under Garmon.

II. THE EMPLOYER'S MOTION DID NOT VIOLATE THE ACT BECAUSE IT WAS REASONABLY BASED AND WAS NOT RETALIATORY.

In BE & K Constr. Co. v. NLRB,<sup>25</sup> the Supreme Court rejected the Bill Johnson's standard for deciding whether ultimately unsuccessful lawsuits violate the Act. Under Bill Johnson's, once a lawsuit was shown to be without merit, the Board could proceed with the unfair labor practice case regardless of whether the suit had a reasonable basis.<sup>26</sup> The Court found that standard to be overly broad because it subjected "genuine petitioning" to liability as an unfair labor practice.<sup>27</sup> As a result, the Board can no longer rely solely on the fact that the lawsuit was ultimately without merit to find an unfair labor practice. Rather, the Board must determine whether the lawsuit, regardless of the outcome, lacked a reasonable basis.<sup>28</sup>

Because the Court did not articulate in BE & K the standard for deciding whether a completed lawsuit is baseless, the Bill Johnson's standard for evaluating ongoing lawsuits remains authoritative. In that case, the Court stated that while the Board's inquiry need not be limited to the bare pleadings, the Board could not make credibility determinations or draw inferences from disputed facts because that would usurp the fact-finding role of the judge or jury.<sup>29</sup> Further, just as the Board may not decide "genuinely disputed material factual issues," it must not decide "genuine state-law legal questions." These are legal

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<sup>25</sup> See 536 U.S. at 536.

<sup>26</sup> Id. at 527-528 (quoting Bill Johnson's, 461 U.S. at 747).

<sup>27</sup> Id., 536 U.S. at 533-534.

<sup>28</sup> Id. at 535-537. The Court left open the possibility that an unsuccessful but reasonably based lawsuit that would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome," may be an unfair labor practice. Id. at 536-537.

<sup>29</sup> See Bill Johnson's, 461 U.S. at 744-746.

questions that are not "plainly foreclosed as a matter of law or . . . otherwise frivolous."<sup>30</sup> Thus, even after BE & K, a lawsuit lacks a reasonable basis if it presents unsupportable facts or unsupportable inferences from facts and presents "plainly foreclosed" or "frivolous" legal issues.

The Court also considered in BE & K the Board's standard of finding that a respondent-employer possessed a retaliatory motive in cases where "the employer could show the suit was not objectively baseless."<sup>31</sup> The Court interpreted the Board's standard as finding retaliatory motive where an employer's lawsuit itself related to conduct protected under the Act, despite the employer believing the conduct violated another federal law. The Court criticized the use of such a standard in cases dealing with non-meritorious, reasonably based lawsuits.<sup>32</sup> Similarly, the Court reasoned that inferring a retaliatory motive from evidence of antiunion animus would condemn genuine petitioning in circumstances where the plaintiff's "purpose is to stop conduct he reasonably believes is illegal[.]"<sup>33</sup>

However, while the Supreme Court in BE & K rejected the Board's standard of finding a lawsuit retaliatory solely because it was brought with a motive to "interfere with the exercise of [Section 7] rights,"<sup>34</sup> the Court limited its holding to reasonably-based lawsuits.<sup>35</sup> In rejecting the Board's retaliatory motive standard, the Court stated:

If [a plaintiff's] belief is both subjectively genuine and objectively reasonable, then declaring the resulting suit illegal affects genuine petitioning.<sup>36</sup>

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<sup>30</sup> Id. at 746-747.

<sup>31</sup> BE & K, 536 U.S. at 533.

<sup>32</sup> Id. at 533-534.

<sup>33</sup> Id. at 534 (emphasis in original).

<sup>34</sup> Id. at 533.

<sup>35</sup> Indeed, at the outset of its retaliatory motive discussion, the Court noted that it granted certiorari on the issue of whether the Board "may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless." Id. at 533 (emphasis added).

<sup>36</sup> Id. at 533-534 (emphasis added).

Thus, even after BE & K, the analysis of retaliatory motive as to baseless lawsuits continues to be that set forth in Bill Johnson's, and the cases applying Bill Johnson's.

Based on the foregoing, the two issues here are whether the Employer's Motion to Limit Plaintiffs' Improper Communications With Putative Class Members was reasonably based and whether it was filed with a retaliatory motive. Because we conclude that the motion was reasonably based and not filed with a retaliatory motive, we conclude that the Employer did not violate the Act.

A. The Employer's Motion to Limit Plaintiffs' Improper Communications With Putative Class Members Was Reasonably Based.

By granting in substantial part the Employer's motion, the state court demonstrated that it was reasonably based. Thus, the motion primarily sought to limit the e-mail communications from Banks, who was employed by the law firm representing the plaintiffs, to current employees because they contained "false, misleading, and confusing information" about the pending overtime suit. In granting the motion in substantial part, the state court concluded that certain aspects of Banks' messages were in fact misleading, legally incorrect, and coercive. As a result, the state court imposed restrictions on the manner and content of any communications with putative class members. For example, counsel for both parties and their agents were required to obtain court approval for communications regarding settlement and neither party could send messages discussing the likelihood of prevailing on the merits. The court also provided guidelines on permissible contacts, such as permitting counsel to communicate with putative class members to investigate the facts of the case. In sum, the state court structured an order that prohibited communications similar to those found to be false and misleading in Banks' group e-mail messages. Because this was the main objective of the Employer's motion, we cannot assert that it was baseless.

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B. The Employer Did Not File Its Motion With a Retaliatory Motive.

In BE & K, the Court stated that an unsuccessful but reasonably based lawsuit might be considered an unfair labor practice if a litigant would not have filed it "but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA protected activity. . . ." <sup>37</sup> Here, there is no evidence that the Employer filed the motion solely to impose additional litigation costs on the plaintiff-employees or without any regard for its outcome. Rather, it appears that the Employer filed the motion in an attempt to stop what it genuinely considered to be inappropriate communications between plaintiffs' counsel and putative class members. Thus, applying the general principle set forth in BE & K, the Employer did not possess the requisite retaliatory motive.

In sum, the Region should dismiss this charge, absent withdrawal.

B.J.K.

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<sup>37</sup> Id. at 536-537.